Independent review of administrative law

Response to call for evidence

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About Centre for Governance and Scrutiny

CfGS is a social purpose consultancy, experienced in all aspects of governance and scrutiny. We passionately believe that better governance and scrutiny leads to more effective decision-making, reduced risk and ultimately improved outcomes. Our work spans corporate decisions impacting on the public, to how tax payers' money is spent. We focus on behaviours and culture, as well as design and delivery.

Introduction

1. This response engages with the overall objective of the Review, which states that it "should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law".

2. Judicial review of executive action is an intrinsic part of the overall framework of governance in the UK at both national and local level. Describing the right of individuals or groups with standing to bring action as "balanced" with the business of effective government is a misapprehension, because judicial review is a mechanism to ensure government is effective, by striking down those decisions which are significantly flawed for reasons of process. We will explore this fundamental issue in more detail in the first section.

3. Along with other areas of law and policy, judicial review has evolved in recent years to keep pace with the evolution and development of modern local and national Government. This is in line with the nature – and strength – of the UK constitution as a dynamic one. Seeking through legislative means to codify (and/or constrain) the power of the courts to further evolve and develop risks that judicial review will become ossified and unable to develop – resulting in perverse outcomes both for Government and for applicants, not to mention the negative impact on the rule of law more generally.

Judicial review and the web of accountability

4. The rights and responsibilities of the courts to review executive action are not held and exercised in isolation. The role of the courts and the role of Parliament do not sit in tension. They are part of a wider framework to which public bodies generally are subject; a "web" of accountability[1] in which a range of stakeholders are engaged in "public reason"[2], and the support and enforcement of basic principles of democracy and good governance.

5. This web has many nodes to it. The rule of law, in general, binds public bodies – insofar as they contract, or carry on acts which render them subject to the law of torts, for example. Public bodies are held to account by Ministers, by Parliament, and ultimately by voters. Public bodies may be held to account by inspectorates and regulators, who hold powers in statute. They may be held to account by non-executive activity – at national level, select committees; at local level, overview and scrutiny committees. Law officers and those with similar positions in other public bodies (including monitoring officers in local authorities) themselves hold decision-makers to account, and in this context the prospect of judicial review sharpens and refines decision-making capabilities to ensure that decisions are defensible.

6. Decision-makers may further be held to account by financial reporting requirements and the audit system. They may be held to account by the press and the media at large.

7. Other parts of the by and large uncodified constitution also act as a means of accountability. The Cabinet Manual and the Civil Service Code are part of this landscape.

8. Like all of these mechanisms of accountability, judicial review is necessary for effective and consistent decision-making. Attempts to constrain its

[1] Centre for Governance and Scrutiny, "Accountability Works!" (2010)

[2] Rawls J, "Political Liberalism" (Columbia University Press, 1993), p212 et seq. The jurisprudential basis for these contentions is set out in more detail in Murkens, J (2018) *Judicious review: the constitutional practice of the UK Supreme Court.* Cambridge Law Journal, 77 (2). pp. 349-374

application because its presence is administratively inconvenient to Government take no account of:

- The presence of the principles that underpin its operation in the common law, principles that would persist notwithstanding any attempts to restrict it;
- The existing constraints on judicial review, which ensure that it plays a restricted and proportionate role in our constitutional settlement;
- The growing tendency of Government to legislate in a way that minimises effective Parliamentary scrutiny, and therefore suggest a need for more "anxious scrutiny" by the courts on matters which affect individual rights;
- The extent to which it is open to Government to place certain issues beyond the remit of law by claiming that they are "non-justiciable", even by purporting to pass legislation to this effect.

9. The rest of this submission will deal with each of these issues in turn.

The impact of "common law" constitutionalism

10. A trend in judicial review for most common law jurisdictions in the past twenty years has been the development of the concept of "common law" constitutionalism – the idea that the courts can find in precedent the basic principles which underpin the application of the rule of law, and can (should) use those principles to guide their judgments[3].

11. While the concept has been the subject of controversy, it is a matter of fact that judgments in the Supreme Court have sought to find overarching principles to govern the application of judicial review, in preference to finding those principles in (for example) EU law or in the Convention rights. The trend has continued through the 2010s at the highest appellate levels, in cases such as *Kennedy*[4] and *Pham*[5].

12. Placing judicial review on a statutory footing would seem to require that the courts' ability to access and make precedent be restricted; a codification would be designed to somehow work against the development of further caselaw. If this were the case to which common law principles ought justices have specific regard in reaching judgment? To seek to argue that reliance on such principles should be excluded (by way of codification in statute) seems absurd, because if that were to happen there would be no effective way for the Supreme Court (but also inferior tribunals) to consider how the rights of an individual applicant have been affected; there would be no conceptual basis on which to affix the need for "anxious

[3] See, for example, Toulson LJ in *R (Guardian News and Media) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420

[4] *Kennedy v The Charity Commission* [2014] UKSC 20

[5] *Pham v Secretary of State for the Home Department* [2015] UKSC 19

scrutiny" (which we discuss later) and no way to effectively carry out such scrutiny.

13. The courts have access to common law principles in making decisions in all other areas of the law. The question is – if that should, uniquely, not be the case for judicial review, what would be the public policy reason for effectively removing the courts from centuries of English precedent?

Existing constraints on judicial review

Process, not merits

14. Despite the development of precedent in administrative law in the past thirty to forty years it remains axiomatic that judicial review is not concerned with matters of substantive public policy – that is, it is concerned with the way in which law gives effect to a policy objective rather than the moral rectitude of the objective itself. Neither common law constitutionalism (discussed above) or the development of the "proportionality" ground of judicial review (discussed below, along with the parallel development of "anxious scrutiny" which may engage closely with substantive issues) affect fundamentally this general principle.

15. The courts need to be able to understand the objective of a particular policy in order to be able to determine the extent to which measures taken to achieve it might be irrational or (in respect of certain actions) disproportionate. Recognising the risks of judicial engagement with substantive matters, the standards for these grounds to be met remains extremely high. This point is discussed further below.

Standing, interveners and time limits

16. Judicial review continues to be focused on the impact of executive action on specific individuals or groups who might be the subject of this action. The need to demonstrate standing continues to be a fundamental part of the landscape and there is little to demonstrate a relaxation or loosening of this.

17. Executive action will always have an impact on someone, somewhere. It is right that an individual subject to such action should have the opportunity to effect challenge, if that action impinges upon those rights. It is the assertion of those rights with which judicial review is concerned. The nature of the infringement of those personal rights will be different from instance to instance. The nature of this variability means that it would be difficult to envisage a new statutory framework to determine, or limit, the concept of standing which would not arbitrarily exclude those with legitimate cause from asserting their rights. At least, no such formulation has to our knowledge been proposed.

18. Government has unique power to constrain the rights of the individual. There is not, in any meaningful sense, any equality of arms between the individual, subject to laws made by Parliament, and Government, introducing and implementing those laws. Judicial review has emerged precisely because without it, those individual rights could be subject to attack; this is not an abstract point, and some of the earliest judicial review case law concerns itself directly with these issues[6].

19. The law relating to intervention has recently been amended, to make clear that interveners may not be granted costs for their involvement in a case[7], which works against the argument that intervention is a right used frivolously. The courts have stated that the contribution made by interveners can be useful in understanding the background and context to a case, and that intervention is "relatively rare"[8]. Under the circumstances it is difficult to justify further restriction here.

20. On time limits, there is no obvious public policy reason to further constrain the time available for applicants to bring a review. The nature of administrative action is that it may take some time from a decision being made for its impact to become clear. It may take some time between an impact on an individual being clear to the full scope and nature of that impact being understood. The presence of a three month time limit, as the law stands, does not seem unreasonable in that context.

21. This point was considered, and dealt with, at length in *Nash*.[9] Government could seek, of course, to disapply the principle in *Nash* and to require that the clock should begin running from the making of the *first* of a "cluster" of decisions, particularly where, by definition, the first of these decisions would already render the administrative action in question flawed. This would involve a restatement and expansion of the rule in *ex p Greenpeace*[10], which the judgment in *Nash* sought to distinguish. However, given the reasons given in *Nash* for the distinguishment of the facts of that case from the rule in *Greenpeace*, it is difficult to identify a consistent principle that could be applied to such actions without, for edge cases, risking arbitrariness. Part of the benefit of the case law on this subject is the way that the courts have used the opportunity to restate and refine the provisions in the Act to meet the needs of justice in each case.

Restricted and careful development of the irrationality / proportionality grounds

22. The ground of review which could be subject to the suggestion that it veers into substantive review is that which relates to irrationality (and

[6] Notably, of course, *Attorney-General v De Keyser's Royal Hotel Limited* [1920] UKHL 1 and *Liversidge v Anderson* [1941] UKHL 1, in particular Lord Atkin's obiter judgment

[7] *R (Air Transport Association of America) v Secretary of State for Energy and Climate Change* [2010] EWHC 1554

[8] *In the matter of Northern Ireland Human Rights Commission* [2002] UKHL 25, [2002] NI 236, at para 36

[9] *R (Nash) v Barnet LBC* [2013] EWCA Civ 1004

[10] *R v Secretary of State for Trade and Industry ex parte Greenpeace* [1998] Env LR 415

proportionality, inasmuch as it applies to EU law and law relating to human rights). As we have noted above the bar for proof of such matters is resolutely high. Although the courts have toyed with a move into substantive review in recent years[11] and the prospect of essentially "replacing" (or possibly supplementing) irrationality with proportionality as a separate ground of review still seems likely[12], it is not a step that has yet been made. Irrationality / unreasonableness – with its exceptionally high bar – remains. The courts have been unwilling to take what might be seen as the next natural step[13] – and this reticence suggests that when it may, in due course, happen it will be focused on those cases which demand the most "anxious scrutiny".

23. It is the concept of "anxious scrutiny" which best reflects the courts' reticence in overstepping their constitutional role. The courts have recognised that the extent of their scrutiny in such matters should be reflected by the impact of the decision itself; this principle sits in explicit defence of the executive's right to act and is designed to draw back from anything approaching substantive review in all but the most significant cases.

24. If Government is concerned that, for some reason, the concept of proportionality is one alien to English law it could choose to legislate to the effect that the ground may not be used or, for example, that the ground of irrationality as set out in *Wednesbury* and *GCHQ* should remain. However, again, it is difficult to determine a public policy reason for this decisive break from recent precedent, and it is difficult too to imagine how legal certainty would be assisted by the rolling back of the case law on these matters to the mid-1980s, particularly given the comments made above on common law constitutionalism.

Legal certainty and delegation: "skeleton" bills, Henry VIII clauses and the use of statutory guidance

25. It has become common for Government to introduce, and for Parliament to enact, so-called "skeleton" Bills – legislation which provides a broad framework within which Government can choose to enact delegated legislation. This legislation would not be subject to the same vigorous scrutiny as primary legislation. A necessary provision of such Bills are so-called "Henry VIII" clauses – clauses which grant a Minister extremely wide discretion to make law through secondary legislation.

26. This has been a particular theme, and has caused controversy, in respect of the Coronavirus Act 2020, and the delegated legislation which has followed

[11] The prospect of proportionality being incorporated into JR as a distinct ground was first mooted at a senior level by Lord Diplock in the GCHQ case.

[12] *R (Association of British Civilian Internees (Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473

[13] See, for example, *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69

from it[14]. The burgeoning use of statutory guidance, which is not subject to meaningful Parliamentary oversight, compounds these issues.

27. An absence of Parliamentary scrutiny involves a weakening of one of the nodes in the web of accountability; it is therefore necessary for other parts of the governance system to be strengthened in order to redress this balance.

28. Under these circumstances the courts are not in the position to use *Pepper v Hart* to divine Ministers' intent, making it yet more difficult to carefully deploy anxious scrutiny in a proportionate manner. The increased use by Government of these kinds of legislative tactics arguably make it more likely that actions brought against Regulations or Orders made in this manner will be subject to more vigorous oversight.

Placing Government beyond the law through purported "non-justiciability"

29. Notwithstanding all of the foregoing, would it indeed be possible for Government, and Parliament, to amend the law to place certain decisions beyond the bounds of justiciability.

30. The current scope and nature of non-justiciable powers is generally understood to encompass a number of the prerogative powers exercised by Government. In order for these powers to be placed on a statutory footing Government would need to define the use of these powers and the boundaries of non-justiciability.

31. Placing this in law would by definition make the precise boundaries of those non-justiciable matters themselves justiciable, making the whole exercise tautological. On a more fundamental level, it is open to argument that an attempt by Government to assert the conscious removal of certain of its actions from judicial oversight is not something which is possible, notwithstanding any success in following the forms and process of Parliamentary procedure to make it law. The non-justiciability of prerogative powers is historically a matter of practice and tradition rather than fact; it may be possible to assume that such powers are non-justiciable but the application of law to them may lead to the conclusion that, in fact, they are. In a modern pluralist democracy, it is extremely difficult to argue that the shadows of non-justiciability penetrate much further than the rights of statecraft afforded to the Crown around international diplomacy and the waging of war. It seems unnecessary to cite the Bill of Rights in favour of this contention, that Government and the Crown should, notwithstanding the presence of rights and privileges unique

[14] Particularly insofar as it intersects with powers available in the Public Health (Control of Disease) Act 1984. A fuller critique has been made by Walker C & Blick A, "Coronavirus Legislative Responses in the UK" (Just Security / NYU School of Law, 2020): Blogpost, https://www.justsecurity.org/70106/coronavirus-legislative-responses-in-the-uk-regression-to-panic-and-disdain-of-constitutionalism/ [Accessed 16 October 2020]

to those institutions, fundamentally be subject to the law – the law being a separate and discrete institution independent of Government control.

32. This should not be a surprising or novel idea; it was posited (obiter) by Lord Steyn in *Jackson*[15], at para 102:

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

33. The question exists as to whether there are other executive powers held by Government which Government could choose to put beyond the scope of law. If it chose to purport to do so in respect of certain of the prerogative powers, there would be little to prevent it from doing so on other matters.

34. This is where modern Government administration comes up against the moribund Diceyan principle of unrestricted parliamentary sovereignty, a principle whose existence was moot in Dicey's day and which certainly now appears difficult to justify. Assertion of its continued existence despite evidence to the contrary is not enough. We have noted above the principles of common law constitution, and the identification of fundamental, bedrock principles which underpin the rule of law; we have also noted the existence of governance and accountability under the English and UK constitutional settlement as a web, rather than a hierarchy with Parliament (and by extension Government) sitting at the top. In the event that Government did attempt to legislate to curtail or restrict the applicability or operation of judicial review, it could bring about the recognition and passage into law of restriction on Government power far more significant than exist today.

[15] *R (Jackson) v Attorney General* [2005] UKHL 56